No. 15042

# United States Court of Appeals
## For the Ninth Circuit

SEATTLE ASSOCIATION OF CREDIT MEN, a corporation,
*Appellant,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

## APPELLANT'S REPLY BRIEF AND MOTION TO AMEND

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### Jurisdiction

Appellee, in its brief (pps. 31-32), argues that this court cannot consider jurisdictional grounds not stated in the Complaint (Tr. 4) and further contends that the issue was not assigned as error nor included in the statement of points on appeal.

As appears from Appellant's Brief (p. 2) the sole specification of error was upon the dismissal for want of jurisdiction.

As appears from the Record (Tr. 35), the sole point on which appellant relies in this appeal is the error in dismissing for want of jurisdiction.

Appellant concedes that certain jurisdictional statutes, now relied upon in this appeal, were not included

in its Complaint. Therefore, to cure this defect, if it be one, appellant moves, pursuant to 28 U.S.C. §1653, for leave to amend paragraph III of its Complaint (Tr. 4) to include as jurisdictional grounds all the statutes cited in the first paragraph of its statement of Jurisdiction (Br. 1) upon such terms as this court may impose. *Ohio v. Swift,* 270 Fed. 140; *Swayze v. Barsch,* 226 Fed. 581; *Keene Lumber Co. v. Leventhal,* 165 F. (2d) 815.

Appellant submits, that to grant such motion would not inconvenience appellee, as the latter has fully replied to this subject matter in its brief and takes the position that the lower court decided this case correctly, regardless of the particular jurisdictional ground involved.

Further, none of the cases cited by appellee on the subject of whether this court can hear the issue are applicable. All are appeals from the Tax Court or the Board of Tax Appeals. All involved cases where entirely different issues were raised on appeal from those heard by the board. Here, the only issue is jurisdiction.

**Adequate Remedy**

On at least two occasions in its brief (pps. 9, 19), appellee states that appellant's Complaint is defective because there is no showing that appellant's remedies at law are inadequate.

First, appellant knows of no reason why such allegation is necessary in this action, it not being an action for an injunction.

Second, appellee states that appellant's remedies are not inadequate because appellant can sit back and wait for the United States to bring suit under §3710 of the Internal Revenue Code of 1939 (Br. 9, 19). Please note, in this connection that the United States was most careful to state that it would "probably" be required to sue. This is exactly what appellant complains of. The United States does not want to sue because it does not want an adjudication on the merits.

Next, the appellee states that appellant has a remedy in 26 U.S.C. §1340 by paying upon demand and suing for a refund (Br. 9, 20, 36). *Adler v. Nicholas,* 166 F. (2d) 674, held distinctly that a non-taxpayer cannot sue for refund of taxes collected in such circumstances (Appellant's Br. 9, 10). See also *Stuart v. Chinese Chamber of Commerce* (9th Cir.) 168 F.(2d) 709.

**Misconceptions**

The essence of appellee's whole argument is that the present suit will not lie because it does not involve a question of whether the property levied upon was the property of the taxpayer or the property of some third party non-taxpayer (Br. 10, 21, 22, 25, 26, 28, 35, 36). Yet in fact that is exactly what this suit does involve (Tr. 3-28) (Appellant's Br. 1-2). Thus appellant's citations are germane to that subject, as appellee concedes.

Appellee attempts to turn this case into a question of priorities. To do so, it refers to that as the sole issue (Br. 10, 17, 18, 21, 25) by labeling appellant's Bill of Sale in Lieu of Foreclosure (Tr. 5, 23-27) an assign-

ment for the benefit of creditors. Apparently on the theory that if you call a Bill of Sale an "Assignment for the Benefit of Creditors" long enough, it will become an assignment, the appellee refers to the Bill of Sale as an assignment for the benefit of creditors on eleven different occasions (Br. 2, 9, 10 (2) 11, 18, 20, 21, 25, 34, 36).

Appellant concedes at this point that if the Bill of Sale were an Assignment for the Benefit of Creditors, and if the mortgage merged into the Bill of Sale, then the United States would be prior and there would have been no lawsuit and there would have been no appeal. Even the appellant recognizes the force of Rev. Stat. § 3466 under such circumstances.

But to call the Bill of Sale an "assignment" without ever receiving an adjudication thereon, and then making one's whole argument on that theory is nothing more than bootstrap lifting.

The same is true of the argument (Br. 9, 20, 34) that appellant failed to allege that appellee's lien could not have been acquired prior to the "assignment." If the Bill of Sale were an assignment, there would be no lawsuit. But this case does not involve priorities; it does involve the question of whose property was the levy made upon. The issue of whether the Bill of Sale was an assignment was not determined in the lower court. The action was treated solely as a jurisdictional question (Tr. 30-32).

Finally, appellant wonders where appellee gets the conception that appellant disclaims any interest in the

subject property (Br. 9, 15). Such is not true, and saying so does not make it so. Appellant claims ownership of the property clearly and unequivocally (Tr. 4, 9).

To make its ownership position clear, appellant sets out the following table:

a) July 1, 1952—trust mortgage to appellant by Western Appliance Co. (Tr. 4).

b) July 1, 1952—assignment of accounts receivable to appellant by Western Appliance (Tr. 4).

c) July 1, 1952—notice of assignment of accounts receivable to Secretary of State (Tr. 4-5).

d) July 3, 1952—recordation of (a) with County Auditor.

e) March 27, 1953—appropriation of bank reserve account (Tr. 7).

f) March 31, 1953—accrual of U.S. taxes for 1st quarter, 1953 (Tr. 5).

g) June 2, 1953—foreclosure of (a) by Bill of Sale (Tr. 5).

h) June 5, 1953—recordation of (g) (Tr. 5).

i) Between June 2, 1953 and June 15, 1953—sale of assets covered by Bill of Sale by appellant (Tr. 5).

j) June 15, 1953—lien of U.S. taxes recorded (Tr. 6).

k) June 15, 1953—levy on appellant for (j) (Tr. 5).

l) June 18, 1953—levy on N.B. of C. for (j) (Tr. 7).

From the foregoing, it should be perfectly clear that appellant claims ownership of the funds in question, which ownership ripened on June 2, 1953, at the latest, and that appellee's subsequent lien and levy on June 15, 1953, became a cloud on such funds thereafter.

**Conclusion**

Appellee seems to predicate its argument on the theory that, were this a suit to determine the ownership of the funds in question (which it is), then the district court would have had jurisdiction, but since the Bill of Sale vesting title in appellant was actually an assignment for the benefit of creditor (which is the undecided issue on the merits), and thus the suit is one to determine priority (which it is not), the lower court had no jurisdiction under §2410 or any other statute (which appellant would concede if the Bill of Sale were an assignment).

In effect, by presuming that the lower court would decide the real issue of this case (to-wit: ownership of the funds) in its favor (for which finding the lower court had jurisdiction) appellee arrives at the conclusion that the lower court did not have jurisdiction because the property subject to the levy was actually the property of the taxpayer in the hands of an assignee for the benefit of creditors and therefore the issue is one of priority, not title.

In short, the argument of the United States, according to all rules of logic, begs the entire question of jurisdiction by presuming a ruling on the key fact (ownership) which has never been decided and over which issue the appellee virtually concedes the district court had jurisdiction (Br. 10, 21, 22, 25, 26, 28, 35, 36). [E.G.: Suppose $x + 1 = y$. If $x = 2$, $y = 3$. But how do we know $x = 2$?]

Lest there be any doubt as to appellant's position, appellant contends that this suit is one to decide

whether the Director has levied upon the property of the taxpayer or the property of appellant, upon which point both appellee and appellant agree that all of appellant's citations are in point.

Appellant itself indulged in the mumbo-jumbo of double-talk in its brief (pps. 13-14) when it discussed the issues. Actually the issue of priority does not exist until after a decision is made on ownership. To state the issues in the alternative was erroneous.

Wherefore, appellants prays as follows:

(1) That its motion for leave to amend be granted.

(2) That the order of dismissal be reversed and that the matter be remanded for trial.

Respectfully submitted,

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